

Hearing:
December 2, 1999

Paper No. 46
CEW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 3, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Minuteman International, Inc.
v.
Royal Appliance Mfg. Co.

Opposition No. 99,534
to Application No. 74/602,203
filed on November 23, 1994

James J. Hill of Emrich & Dithmar for opposer.

Sandra M. Koenig and Patrick R. Roche of Fay, Sharpe,
Beall, Fagan, Minnich & McKee for applicant.

Before Walters, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Minuteman International, Inc. filed its opposition to
the application of Royal Appliance Mfg. Co. to register the
mark MVP for "electrical vacuum cleaners for both domestic
and industrial use" in International Class 9.¹

¹ Application Serial No. 74/602,203, filed November 23, 1994, based upon
an allegation of a bona fide intention to use the mark in commerce in
connection with the identified goods.

As amended grounds for opposition, opposer asserted that applicant's mark, when applied to applicant's goods so resembles opposer's previously used and registered mark MPV for "vacuum cleaners for commercial and industrial use"² as to be likely to cause confusion under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d).

Applicant, in its answer, denied the salient allegations of the claim and asserted that the parties' marks create different commercial impressions and that the channels of trade for the goods identified by the respective marks do not overlap.³

Procedural Matters

1. Confidential Filings

We begin by noting the stipulated protective order between the parties and the motion therefor, which was acknowledged and entered by the Board. In this regard, we note the relevant provisions of Trademark Rule 2.125(e), 37 CFR §2.125(e):

² Registration No. 1,937,213, issued November 21, 1995, in International Class 9, subsequent to the November 3, 1995, filing of the notice of opposition herein. The application from which this registration issued was filed on December 12, 1994, which is the constructive date of first use of the mark. See Section 7(c) of the Trademark Act, 15 U.S.C. 1057.

³ While identified as "affirmative defenses," these statements are simply amplifications of applicant's denials.

Upon motion by any party, for good cause, the Trademark Trial and Appeal Board may order that any part of a deposition transcript or any exhibits that directly disclose any trade secret or other confidential research, development, or commercial information may be filed under seal and kept confidential under the provisions of §2.27(e).

However, opposer cannot shield from the public information that is not appropriately confidential. Applicant submitted several redacted exhibits in a separate envelope clearly designated as confidential, and these exhibits will be treated as confidential. However, opposer has designated entire depositions and, apparently, its brief as confidential. We find it unlikely that this entire submission requires confidentiality. Therefore, within thirty days of the date of this decision, opposer must resubmit its material presently designated as confidential with those portions which are not truly confidential being submitted in the normal manner, and only those pages which truly need to be kept under seal being submitted in a separate envelope clearly designated as confidential.⁴ If no resubmission is made within the specified period, we will place opposer's entire submission in the publicly available opposition file.

⁴ To the extent possible, the Board encourages opposer to redact confidential information from its exhibits.

2. Evidentiary Objections

Both opposer and applicant have entered objections to specified submissions by the other and we consider these objections now.

On March 31, 1998, opposer objected to applicant's evidence submitted by notice of reliance on December 23, 1997, on the grounds of competency, alleging lack of foundation and hearsay, and complaining that applicant's "Exhibits 3-28" were "produced after the close of discovery." Opposer repeated its objections in its brief. Opposer's objections are not well taken and opposer's request to strike this evidence is denied.

Applicant's documents identified as "Exhibit 2" were submitted to opposer as part of applicant's answer to opposer's Interrogatory No. 8, which opposer relies on herein, and applicant has adequately explained why this supplementation is necessary.

The document identified as "Exhibit 3," the American Society for Testing and Materials (ASTM) document entitled "Standard Terminology Relating to Vacuum Cleaners," is properly made of record by notice of reliance under Trademark Rule 2.122(e) because it is a document that appears on its face to be available to that segment of the public, namely, the vacuum cleaner trade, that is

commercially interested in the distinctions, if any, between commercial and household vacuum cleaners. Similarly, the dictionary definition and periodical and news articles submitted as "Exhibits 4-28" appear to be printed publications of general circulation and, therefore, are properly submitted by notice of reliance. As such, this evidence is self-authenticating. Further, this evidence is not hearsay because it is not considered for the truth of the information contained therein. Rather, it is evidence that the relevant public has been exposed to this information and it may be probative of the relevant public's understanding of that information.

Opposer's specific objections to applicant's evidence pertain, more appropriately, to the weight to be accorded to this evidence rather than to its admissibility.⁵

In its brief, applicant objected to pages 5-10 and 18-28 of the second testimony deposition of Jerome Rau as improper rebuttal. Applicant's objections are not well taken and applicant's request to strike this testimony is denied. The noted testimony appropriately responds to the issues of trade channels and relevant purchasers that were

⁵ Opposer's allegation that the indicated documents were not disclosed to opposer during discovery is not well taken as opposer has provided no information regarding the specific questions asked by opposer to which applicant allegedly did not respond, nor did opposer file a timely motion to compel discovery.

addressed by applicant in its testimony and evidence as significant aspects of applicant's case.

3. *Motion to Amend Identification of Goods*

Applicant has filed a motion, which is opposed by opposer, seeking to amend its identification of goods to "electrical vacuum cleaners for domestic use." This motion is denied as untimely. *See Trademark Trial and Appeal Board Manual of Procedure*, Section 514.03. Applicant filed its motion on December 8, 1997, more than a month after opposer's extended testimony period closed on October 15, 1997.

The Board has the discretion to grant such motions if appropriate; however, we find that to do so in this case would unfairly prejudice opposer. While the record clearly reflects the actual differences between domestic, or household, vacuum cleaners and commercial vacuum cleaners, the record is less than clear about the extent, if any, to which the trade channels and purchasers differ as a result of the differences in these products, and the significance of any such differences. Clearly, it would be prejudicial to opposer to reframe the issues in this manner during trial and subsequent to opposer's presentation of its case.

The Record

The record consists of the pleadings; the file of the involved application; a certified status and title copy of Registration No. 1,937,213 and a copy of the application from which the registration issued; various specified responses of applicant to opposer's interrogatories and requests for admissions; and print advertisements, all made of record by opposer's notices of reliance; and the testimony depositions by opposer of Jerome E. Rau and C. Robert Borreson, both with accompanying exhibits. Additionally, the record consists of various specified responses of opposer to applicant's interrogatories; opposer's documents produced in response to applicant's document requests; print advertisements; manuals; periodical and news articles; and dictionary definitions, all made of record by applicant's notices of reliance; and the testimony depositions by applicant of Richard Farone and Cynthia Caffoe, both with accompanying exhibits. Both parties filed briefs on the case and an oral hearing was held.

The Parties

The evidence establishes that opposer principally manufactures commercial and industrial cleaning equipment, including commercial and industrial vacuum cleaners.

Opposer sells its vacuum cleaner products primarily through distributors, janitorial supply dealers and its own sales force to schools, hospitals, industry, offices and contract cleaners (*i.e.*, the commercial market). Opposer is a member of the International Sanitary Supply Association (ISSA) and considers ISSA's annual trade show, a closed show for distributors only, to be its principal venue for launching new products. Opposer introduced a model of an upright commercial vacuum cleaner, identified by the mark MPV, at the 1994 ISSA annual show in Las Vegas. The MPV mark appears on a decal on the front of the vacuum cleaner, which is sold to the ultimate purchaser for approximately \$395-\$450. Opposer's evidence of magazine advertising is primarily in trade magazines.

Applicant is a manufacturer of domestic and commercial vacuum cleaners. It produces several models of upright vacuum cleaners for household use under the mark MVP. Applicant also uses MVP to identify a feature, namely, a twelve ampere motor, present in some of its upright domestic vacuum cleaners. The evidence indicates that applicant has made significant sales of MVP vacuum cleaners; that applicant has been using the mark MVP in connection with domestic vacuum cleaners since 1995; that applicant sells its MVP domestic vacuum cleaners through

retailers, such as Wal-Mart, to general consumers; and that some of its MVP domestic vacuum cleaners are sold through independent vacuum cleaner dealers and janitorial supply dealers. Applicant's MVP vacuum cleaners sell for approximately \$160. In most of its advertising, the phrase "Maximum Vacuum Power" appears in close proximity to the acronym MVP. Applicant's evidence of magazine advertising is primarily in magazines directed to the general consumer.

Analysis

Inasmuch as a certified copy of opposer's registration is of record, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).⁶

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Key considerations in this case are the similarities or dissimilarities between the marks, the similarities or dissimilarities between the goods, and the

⁶ Applicant challenges, for the first time in its brief, the validity of opposer's dates of first use of its registered mark. Not only is this allegation untimely, it is essentially a collateral attack upon the validity of the opposer's pleaded registration. Such a claim will not be entertained in the absence of a counterclaim to cancel.

channels of trade and relevant purchasers. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering, first, the marks, in their entirety, we note that both marks consist of the same three letters; that both marks begin with the letter "M"; and that the remaining letters in applicant's mark ("VP") are a transposition of the remaining letters in opposer's mark ("PV").

Opposer argues that the marks, "MPV" and "MVP," are similar nonsense syllables that have no associative meaning in the minds of consumers, who will be easily confused. Opposer bases its argument on the testimony of C. Robert Borresen, a retired psychology professor who specialized in perception as it relates to learning. Dr. Borresen defined nonsense syllables in the context of experimental psychology as three-letter sequences used in experiments involving learning. He described how psychologists derive and string together nonsense syllables to avoid confusion in such experiments. He stated that acronyms are entirely different from nonsense syllables because they call forth associations in the minds of the listeners.

Applicant presented evidence indicating that "MVP" is not a nonsense syllable; rather, it is a common acronym

meaning, particularly in sports, "most valuable player." We also take judicial notice of the definition of "MVP" in *The Random House Dictionary of the English Language*, unabridged (2d ed. 1987), as "Most Valuable Player." Additionally, applicant submitted evidence indicating the use in newspapers and periodicals of "MPV" as an acronym meaning, in the automotive field, "multi purpose vehicle."

In view of applicant's evidence, we are not persuaded by opposer's evidence that, under certain protocols in experimental psychology, "MVP" and "MPV" would be considered nonsense syllables and easily confused as such. However, there is insufficient evidence that either "MVP" or "MPV" would be understood by relevant consumers of the parties' vacuum cleaners as acronyms for, respectively, "most valuable player" or "multi purpose vehicle." In fact, except for evidence indicating that applicant intends consumers to understand "MVP" in connection with its goods as an acronym for "maximum vacuum power," there is insufficient evidence to warrant the conclusion that either party's combination of letters would be understood by consumers as having any significance in connection with vacuum cleaners other than as a trademark.

When both marks are, as in this case, unpronounceable letter combinations, they are likely to be inherently

difficult to remember and, thus, more susceptible of confusion or mistake than are word marks. See *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990); and *Alberto-Culver Co. v. F.D.C. Wholesale Corp.*, 16 USPQ2d 1597 (TTAB 1990) and cases cited therein. This is particularly true where, as here, the marks consist of the same three letters, begin with the same letter, and simply transpose the last two letters. Thus, we find the overall commercial impressions of the marks are substantially similar.

With respect to the goods of the parties, we observe that, applicant's goods as identified in the application, "electrical vacuum cleaners for both domestic and industrial use," encompass opposer's goods in its pleaded registration, "vacuum cleaners for commercial and industrial use." Thus, as identified, applicant's goods are deemed to be, in part, the same as opposer's goods.⁷

The evidence establishes that Underwriters' Laboratories (UL) is an independent organization that establishes standards and certifies, among other products,

⁷ We judicially note that Webster's II New Riverside University Dictionary (1984) defines "commercial" as "1.a. Of or relating to commerce" and "2. Designating products, often unrefined, made and distributed in large quantities for industrial use." Thus, we find "commercial use" to encompass "industrial use" herein, as there is no evidence to the contrary in this record.

vacuum cleaners; that UL standards are different for commercial and domestic vacuum cleaners⁸; and that labels on UL-approved vacuum cleaners must specify whether the UL approval is for commercial or domestic use.

While the evidence establishes that several companies, including applicant, manufacture both commercial and domestic vacuum cleaners, the evidence is less definitive about the significance of the different UL standards for these products and the extent to which the trade channels for commercial and domestic vacuum cleaners overlap. A substantial amount of the discussion on this issue by both parties is merely conjecture. However, it is clear that the channels of trade for commercial and domestic vacuum cleaners overlap to the extent that applicant sells at least some of its MVP domestic vacuum cleaners through janitorial supply stores, which also sell commercial vacuum cleaners.⁹

Presuming, as we must, that the goods of applicant and opposer are sold in all of the normal channels of trade to all of the usual purchasers for goods of the type

⁸ The distinguishing features of commercial and domestic vacuum cleaners include the size of the motor, the composition of the plastic casing and the nature of the plug.

⁹ Thus, based on the record before us, even if we had granted applicant's motion to amend its identification of goods as indicated, our decision on the issue of likelihood of confusion would remain the same.

identified, we conclude that the channels of trade and class of purchasers of the applicant's industrial vacuum cleaners and opposer's commercial and industrial vacuum cleaners are the same. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, "MVP," and opposer's mark, "MPV," their contemporaneous use on the same and related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The opposition is sustained.

C. E. Walters

H. R. Wendel

Charles M. Bottorf
Administrative Trademark Judges,
Trademark Trial and Appeal Board